No. 49161-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JOHN O'CONNELL

Petitioner,

v.

MACNEIL WASH SYSTEMS LIMITED, a Canadian designing and manufacturing company doing business in Thurston County, Washington; AUTO WASH SYSTEMS LLC, a Washington limited liability company; PATRICK HARRON & ASSOCIATES, LLC, a Washington limited liability company; ANDERSONBOONE ARCHITECTS, PS, a Washington professional service company; KAREN BOWMAN and "JOHN DOE" BOWMAN, and their marital community; and DOE CORPORATIONS 1 through 3; Jointly and Severally,

Respondents.

APPELLANT'S AMENDED OPENING BRIEF

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A. Identity of Petitioner

Plaintiff John O'Connell was severely and permanently injured on October 8, 2011 when he was struck by a motorist while working at a drive-through car wash in Olympia, Washington. Plaintiff's injuries and harm are catastrophic and include tearing of internal organs, multiple fractures, and several surgeries. He will need additional future surgery.

B. Trial Court Decision

On April 18, 2014 the trial court granted summary judgment for car wash system manufacturer MacNeil. The motion was filed on March 18, 2014.

A copy of the decision is in Appendix A at pages 1 & 2 . No motion for reconsideration was filed.

At the time of the collision, Plaintiff was standing at the side of the entrance when Defendant Karen Bowman approached the conveyor guide rails and attempted to enter the car wash. Plaintiff was there to assist and help customers align their wheels with Defendant MacNeil's correlator/conveyor system.

Defendant Karen Bowman accelerated as she approached the conveyor, as a result, the correlator/conveyor system failed to keep her vehicle in the track system. She crushed the Plaintiff when her vehicle pinned

him against the tunnel wall of the car wash. The entire collision was captured on video, and all parties have been provided copies during the course of discovery.

All other defendants have been dismissed, or had judgment entered against them. Plaintiff John O'Connell appeals the Summary Judgment Order entered as a matter of right. RAP 2.2.

C. Assignment of Error and Issue Presented for Review

1. The Superior Court committed reversible error when the Superior Court granted Defendant MacNeil's Motion for Summary Judgment.

   Issue: Whether the Superior Court committed error interpreting disputed facts and public policy in granting Summary Judgment to Defendant MacNeil? **YES.**

D. Statement of the Case

Summary judgment exhibits included expert witness opinions from Plaintiff's experts. Dr. Sloan, a human factors expert retained by the Plaintiff analyzed the video of the catastrophic occurrence and concluded:

> [t]he Kia's left front tire struck the conveyor guide rail at an angle when it was about halfway across the second correlator. It follows that 1) the correlators failed to align the vehicle's front tires with the conveyor; 2) the guide rail did not provide an adequate barrier with respect to guarding Mr. O'Connell from exposure to the hazard, and 3) there was little time for Mr. O'Connell to appreciate the danger and respond to it in time to avoid harm.
> *Declaration of Sloan*, pg. 5 lines 18-22, *CP* 438.

Plaintiff John O'Connell has testified that he decided to purchase

MacNeil car wash equipment because the web page for MacNeil was very impressive. *See Declaration of Matthew G. Johnson, O'Connell deposition*, p. 60, lines 10-12, *CP* 530. He was told by MacNeil's hand picked distributer, "that MacNeil Wash Systems was the Cadillac of car wash systems." *Id.,* at p. 64, lines 2-3, *CP* 531.

Mr. O'Connell had no involvement in selecting the specific equipment that went into his car wash. *Id.,* p. 72, lines 14-17, *CP* 532. He relied solely on MacNeil to tell him what was necessary, because MacNeil said they were "the largest, most trusted, dependable car wash equipment people in the world." *Id.,* at page 164, line 14 through p. 165, line 3, *CP* 536-537. (Over objection from MacNeil's counsel).

Mr. O'Connell was told by MacNeil and its representatives that the correlator system, designed and sold to him by MacNeil, would safely guide vehicles onto the wash platform. *Id.*, p. 117, lines 3-6 and p. 141, lines 7-11, *CP* 534-535. In the present case, the MacNeil correlator system failed to safely guide the Bowman vehicle into the car wash, and Mr. O'Connell was severely injured as a result of the failure of MacNeil to either safely design and manufacture the system, by including an appropriate guard, or warn Mr. O'Connell of the dangers. By its own admission, MacNeil never instructed Mr. O'Connell of the need for safety bollards, or any other guarding system.

See, Defendant's 8/30/13 MSJ, p. 7, line 17, *CP* 305. These bollards are intended to protect persons and property from harm. Sloan Dec at p. 9, line 22 through p.10, line 7, *CP* 442-443.

The Declarations of both Dr. Sloan (*Id* at Paragraph 25), *CP* 444, and MacNeil expert Harvey Miller (p. 4 of 1/17/14 report attached as Exhibit B to his Declaration), *CP* 284, both acknowledge the issue of cars hitting pedestrians at car washes, a known problem in the industry. Safety bollards eliminate or reduce the likelihood of pedestrian injury. Sloan Dec at paragraph 28, p. 13, *CP* 446.

The Declarations of both Dr. Sloan and Mr. Miller reference the March, 2011 article by Anthony Analettto, in which he states "Bollards equal safety." Mr. Analetto has 28 years experience in the industry and is the former director of operations of a 74 location national car wash chain.

E. Argument Why Review Should Be Accepted

Review should be accepted because (1) the decision is in conflict with well-established Product Liability Act and negligence case law, and (2) product safety and workplace safety are matters of substantial public interest that should be determined by Court of Appeals.

1. Summary judgment standards – The moving party must show the absence of <u>any</u> genuine issues of material fact.

Summary judgment is appropriate ***only*** if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). "In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper." *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990).

On review of an order for summary judgment, we perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Wojcik v. Chrysler Corp.*, 50 Wash.App. 849, 853, 751 P.2d 854 (1988).

The moving party bears the burden of demonstrating that there is no genuine issue of material fact."If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts

are in dispute." *Atherton, supra*. If the nonmoving party fails to do so, then the summary judgment is proper. *Vallandigham*, 154 Wash.2d at 26, 109 P.3d 805 (citing *Atherton*, 115 Wash.2d at 516, 799 P.2d 250). All questions of law are reviewed de novo. *Berger v. Sonneland*, 144 Wash.2d 91, 103, 26 P.3d 257 (2001).

The Court should consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982). Summary judgment should only be granted where reasonable minds can reach but one conclusion. *White v. State*, 131 Wn.2d 1, 9 (1997).

2. Facts and Law Supporting Reversal.

The expert testimony - when reviewed in the light most favorable to the Plaintiff and Defendant Bowman - and the promotion of public safety in the Washington Product Liability Act, negligence laws, establishes more foundation for acceptance of the Plaintiff's Petition for Review.

MacNeil is liable under the WPLA if it is either a "manufacturer" or "product seller" of the "relevant product". RCW 7.72.010(1 & 2). The "relevant product" is that product, or its component part or parts that gave rise to the product liability claim. RCW 7.72.010(3).

MacNeil acknowledges it is a manufacturer of car wash equipment.

But MacNeil, through its hand picked distributer, informed Mr. O'Connell it was the "Cadillac of car wash systems". Mr. O'Connell reasonably believed he was purchasing a full car wash system from MacNeil.

"A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided." RCW 7.72.030(1).

The product in this case in the full system sold by MacNeil. MacNeil failed to safely design a system to prevent a known hazard, and then failed to warn Mr. O'Connell about that known hazard. Instead, MacNeil assured Mr. O'Connell the correlator/conveyor system would safely guide cars onto the wash platform.

Dr. Sloan opines the inclusion of an appropriate guarding system, such as a bollard, could have prevented this incident. *Sloan Declaration,* Paragraph 28, *CP* 446. In the alternative, MacNeil should have warned Mr. O'Connell of the hazard involved when the correlator/conveyor failed to safely guide vehicles. Dr. Sloan also opines, such a warning, more likely than not, would have prevented this incident. *Id.*

MacNeil had an obligation, under the WPLA, to either design a safe

system, or warn of the danger of vehicles jumping over the correlator, or include safety bollards in the design. The Court in *Parkins v. Van Doren Sales, Inc.,* 45 Wn. App. 19, 25, 724 P.2d 389 (1986), states:

> While it did not design, construct, or install the *pear processing line,* it did design and manufacture the component parts used and installed without substantial modification in assembling the conveyor. It is the design, and subsequent injury because of that design, which form the basis of Ms. Parkins' claim, *i.e.,* the conveyor parts were designed to be assembled in one unique way and because that design did not incorporate guards or warnings, it is not reasonably safe. Van Doren is a product manufacturer within the provisions of the act.

The situation is exactly the same as faced by Mr. O'Connell. He sought a complete car wash system from MacNeil. MacNeil held itself out as providing the best system in the world. O'Connell relied on that information to his determinant, and was injured when the relevant part failed to protect him and MacNeil failed to warn him.

This testimony supports Plaintiff's assertions under the Washington Product Liability Act that Defendant's product is defective in design and Defendant failed to provide adequate warnings. *See e.g., Thongchoom v. Graco Children's Products, Inc.*, 117 Wn. App. 299 (2003) (unsafe design); *Sopriani v. Polygon Apartment Partners*, 137 Wn.2d 319 (1999) (inadequate warning). In *Thongchoom,* the Court analyzed the consumer-expectation standard. *Id.* at 303. The Court found that this standard is met when a

product is more dangerous than the ordinary consumer would expect and is, therefore not reasonably safe under the circumstances of use. *Id.*

Furthermore, in *Soproni*, the Washington Supreme Court was careful to note that in design defect cases, "Fundamentally, it is for the trier of fact to determine if the product was unsafe to an extent beyond that which would be expected by an ordinary consumer." 137 Wn.2d at 329. The Court then continues on to discuss the importance of permitting the jury to hear expert testimony with regard to design defect claims, then reversed the lower court, in part, for failing to do so. *Id.* at 329-30. In the instant case, Plaintiff has provided expert testimony that precludes summary judgment against Defendant.

Similarly, under *Soproni*, the Court set forth the standard for "failure to adequately warn" claims as follows:

> A plaintiff establishes that a product in not reasonably safe by showing that at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the' warnings or instructions of the manufacture inadequate and the manufacturer could have provided the warnings or instructions which ... would have been adequate.

Id. at 325-26.

Dr. Sloan states, "In my opinion, MacNeil Wash Systems Limited knew, or should have known, that sudden unintended accelerations of

vehicles at the entrance to car washes due to either vehicular malfunctions or operator error posed a danger to attendants guiding vehicles onto the conveyor." *Id.,* at paragraph 25, *CP* 444. Dr. Sloan outlines numerous sources within the car wash industry which indicate on going evaluation of this issue since at least 1996. Certainly MacNeil either knew, or should have known of the harm Mr. O'Connell was exposed to with the MacNeil system.

As an alternative, in *Thongchoom*, *supra*, the Court also set forth the risk-utility standard for design defect claims. 117 Wn. App. at 304. This is a separate and distinct standard than the consumer expectation test set forth above (either will result in liability against a product manufacturer). The Court noted that under this standard, liability can be established by showing that "at the time of manufacture, the likelihood the product would cause the plaintiff's harm or similar harms, and the seriousness of those harms, outweighed the manufacturer's burden to design a product that would have prevented those harms and any adverse effect a practical, feasible alternative would have on the product's usefulness."

Here, Mr. O'Connell has testified he relied on MacNeil to provide a complete car wash system because they held themselves out as the best in the world. Mr. O'Connell relied on MacNeil to provide a safe car wash system. He knew they provided many safety warnings and design features, including

lock outs for repairs and danger overhead flags. *Deposition of John O'Connell,* at page 113, lines 18-25, *CP* 533. A reasonable jury could conclude MacNeil should have included appropriate guarding systems, such as safety bollards in the system it designed and sold. Inclusion of an appropriate guard in the car wash system design by MacNeil would have provided the necessary guard Sloan suggests. *Declaration of Sloan,* paragraph 17, p. 7-8, *CP* 441.

Defendant MacNeil relied extensively on *May v Dafoe, 25 Wn. App. 575, 578, 611 P.2d 1275 (1980)*, for the proposition the injury must result from a functioning of the product itself, and not the actions of a third party, for a product's liability claim to be warranted. The *May* decision specifically stated, "However, a manufacturer may be held strictly liable for injury sustained by use of a product which is free from defect in either design or manufacture if adequate warning concerning its potentially dangerous propensities is not given a user." Id., at 577.

In this instance, MacNeil should have warned O'Connell that the correlator/conveyor system would not prevent vehicles from dangerously jumping the track and striking employees. MacNeil knew, or should, have known, this was an issue in the industry.

It is also important to note the *May* case was decided before the

legislative changes made in the Washington Products Liability statue occurred in the early 1980's.

In sum, Plaintiff has provided ample expert testimony on this issue that raises genuine issues of material fact and precludes summary judgment. The Trial Court's Order granting summary judgment dismissal should be reversed.

Product Liability Public Policy.

Buttelo v. S.A. Woods-Yates American Mach. Co., Inc., 72 Wash.App. 397, 864 P.2d 948 (1993):

> Several policy reasons justify imposing on product sellers a duty to protect the public from unsafe products. First, the product seller is in a better position than the consumer to "exert pressure on the manufacturer to enhance the safety of the product." See, e.g., *Rivera*, 145 Ill.App.3d 213, 98 Ill.Dec. at 540, 494 N.E.2d at 662 (quoting *Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 73 Ill.Dec. 350, 454 N.E.2d 210 (1983)). Second, the consuming public typically looks to the seller for advice on selecting, operating, and maintaining the product. *W.E. Johnson*, 238 So.2d 98 at 100. Finally, the product seller is in a better position than the consumer to absorb the cost of any injury caused by the product because the product seller can spread the costs of injury among the entire consuming public. See, e.g., *Price*, 466 P.2d at 723–24.
>
> Before Washington courts had the opportunity to discuss the scope of the holding in Baker, the Legislature acted, superseding the common law of products liability. The resulting statutory scheme reflects the Legislature's reaction, at least in part, to the same concerns expressed by the foregoing *404 authorities. For example, RCW 7.72.010,

clearly differentiates between the casual or occasional seller and the seller who is engaged in ***selling on a regular basis as part of its overall business enterprise***. RCW 7.72.010(1) reads in relevant part as follows:

> "Product seller" means any person or entity that is engaged in the business of selling products .... [T]he term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product.

[***bold italics emphasis added***].

Washington's product liability statutes are intended to protect Washington consumers from harm, including harm from multinational product designers, manufacturers and sellers.

"Harm" includes any damages recognized by the courts of this state: excluding direct or consequential economic loss under Title 62A RCW. RCW 7.72.010(6).

Worker Safety Public Policy.

If the international product designer, manufacturer and product seller had designed a safe product, provided adequate warnings and given proper instructions and guidance to the car wash and its employees, it is reasonable to infer that he work place would have been made safer from recognized hazards of auto washes. The auto wash designer/manufacturer/seller did nothing to help make the work place safer for Mr. O'Connell - even though as the industry leader it knew, or should have known, of the hazards to

workers and the benefits of safety bollards.

Under the Washington Industrial Safety and Health Act (WISHA), employers must comply with two distinct duties: (1) they have general duty to maintain a workplace free from ***recognized hazards***, and this duty runs only from an employer to its employees; and (2) they have a specific duty to comply with WISHA regulations, and unlike the general duty, the specific duty runs to any employee who may be harmed by the employer's violation of the safety rule, but even the specific duty does not create per se liability for anyone deemed an employer. West's RCWA 49.17.060(1,2). It does help explain why the public policy should be enforced against those who bring dangerous products into Washington for use by Washington consumers and workers.

Defendant MacNeil did nothing to tell the Plaintiff about the dangers and did nothing to provide warnings putting workers on notice.

The Courts in Washington also construe WISHA regulations liberally to achieve their purpose of providing safe working conditions for every Washington worker. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wash.App. 333, 336, 24 P.3d 424 (2001); *J & S Services, Inc. v. Washington State Dept. of Labor and Industries*, 142 Wash.App. 502, 174 P.3d 1190 (2007).

3. Attorney Fees

Pursuant to RAP 18.1, Appellant requests his reasonable attorneys' fees before this Court.

G. Conclusion

The Trial Court's Order Granting Summary Judgment for international auto wash designer and manufacter, Defendant MacNeil, should be reversed as a matter of law because there are genuine issues of material fact that preclude dismissal.

The Court's Order Granting Summary Judgment for Defendant MacNeil should be reversed as a matter of law and strong public policies intended to protect Washington consumers and workers. Appellant is entitled to his reasonable attorneys' fees and expenses in this matter.

DATED: December 14th, 2016.

RON MEYERS & ASSOCIATES PLLC

By: _____

Ron Meyers, WSBA No. 13169
Matthew G. Johnson, WSBA No. 27976
Tim Friedman, WSBA No. 37983
Attorneys for Appellant

Appendix A

2

☐ EXPEDITE
☐ Hearing is set
Date: 4/18/14
Time: 9:00 a.m.
Judge/Calendar: Gary Tabor

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

JOHN O'CONNELL,

Plaintiff(s),

v.

MACNEIL WASH SYSTEMS LIMITED, a Canadian designing and manufacturing company doing business in Thurston County, Washington; AUTO WASH SYSTEMS LLC, a Washington limited liability company; CHARTER INDUSTRIAL SUPPLY, LLC, a Washington limited liability company; PATRICK HARRON & ASSOCIATES, LLC, a Washington limited liability company; ANDERSONBOONE ARCHITECTS, PS, a Washington professional service company; KAREN BOWMAN and "JOHN DOE" BOWMAN, and their marital community; and DOE CORPORATIONS 1 through 3; Jointly and Severally,

Defendant(s).

NO. 12-2-00770-2

ORDER GRANTING DEFENDANT MACNEIL WASH SYSTEMS LIMITED'S RENEWED MOTION FOR SUMMARY JUDGMENT DISMISSAL

[PROPOSED]

THIS MATTER having come before the above-entitled Court on Defendant MacNeil Wash Systems Limited's Renewed Motion for Summary Judgment, heard on April 18, 2014, and the Court having considered said defendant's motion, oppositions to defendant's motion, if any; and defendant's reply to oppositions, if any, as well as the oral arguments made by the parties.

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THE COURT FINDS:

1. That the equipment manufactured by MacNeil was not defective and that Plaintiff was not injured by MacNeil equipment.

2. That bollards are not industry standard in tunnel car washes and that it is not customary or standard for car wash equipment manufacturers to recommend, manufacturer or install bollards at car washing.

ACCORDINGLY, IT IS SO ORDERED:

1. Renewed Motion for Summary Judgment is GRANTED for defendant MacNeil Wash Systems Limited, thereby dismissing MacNeil Wash Systems Limited from this lawsuit.

DATED this 18 day of April, 2014.

Honorable Gary R. Tabor
Thurston County Superior Court Judge

Presented by:

PREG O'DONNELL & GILLETT PLLC

By _____
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No. 49161-3-II

DIVISION II OF THE COURT OF APPEALS
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Petitioner,

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MACNEIL WASH SYSTEMS LIMITED, a Canadian designing and manufacturing company doing business in Thurston County, Washington; AUTO WASH SYSTEMS LLC, a Washington limited liability company; PATRICK HARRON & ASSOCIATES, LLC, a Washington limited liability company; ANDERSONBOONE ARCHITECTS, PS, a Washington professional service company; KAREN BOWMAN and "JOHN DOE" BOWMAN, and their marital community; and DOE CORPORATIONS 1 through 3; Jointly and Severally,

Respondents.

DECLARATION OF SERVICE
APPELLANT'S AMENDED OPENING BRIEF

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The undersigned declares under penalty of perjury of the laws of the State of Washington that on the date stated below I caused to be served the document entitled APPELLANT'S AMENDED OPENING BRIEF and this DECLARATION OF SERVICE as follows:

Original and one copy to:
Court of Appeals, Division II

✓] Via ABC Legal Messenger

Counsel for Defendant
Debra Lynn Dickerson
Preg O'Donnell & Gillett
901 5th Ave. Ste 3400
Seattle, WA 98164-2026

[✓] Via U.S. Mail

DATED this 14th day of December, 2016 at Olympia, Washington.

RON MEYERS & ASSOCIATES PLLC
BY: MINDY LEACH
Paralegal